No. 10,506

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

George A. Koch, Executor of the Estate of Adolph J. Koch, Deceased,
Petitioner,

vs.

Commissioner of Internal Revenue,
Respondent.

REPLY BRIEF FOR PETITIONER.

Gerald S. Chargin,
First National Bank Building, San Jose, California,
Attorney for Petitioner.

Subject Index

Table of Authorities Cited

Cases

Miscellaneous

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I.

AN ANALYSIS OF RESPONDENT'S ARGUMENTS.

Respondent seeks to meet the petitioner's argument that the Court below applied an erroneous interpretation of the statutory term "contemplation of death with the contention that if both a purpose to make a subsitute for testamentary disposition and a motive connected only with life are shown to exist then the taxpayer has failed to show that decedent's dominant motive was the one connected with life". (Respondent's Brief p. 15.)

It is submitted that no such doctrine is recognized. *The Land Title & Trust Co. v. McCaughn* (7 Fed. Supp. 742), and the other cases cited by respondent,

do not stand for this proposition. In that case the indenture of trust, executed one year and ten months before the decedent's death at approximately 80 years of age, conveyed "practically all his property" and not merely a substantial portion as here. The motive disclosed was one "to conserve his property for his children, that is to dispose of it in such manner that it could not be dissipated by them after they came into possession of it". As the Court observed (p. 744): "a purpose to conserve the estate against mistakes, errors of judgment, or inexperience of its beneficial owners is not in the least inconsistent with an intention to make its transfer a substitute for testamentary disposition."

But in the instant case the motives disclosed by decedent Koch's statements to his associates (George, Johnston, Compton) were *inconsistent* with the intent to make a substitute for testamentary disposition. Those motives were to make his grandson Ralph "absolutely independent", and to equalize the gift to his grandson with one to his son George.

The Courts uniformly have held that a motive to make one's children and grandchildren, the objects of one's bounty, independent while the transferor is *still alive* is *inconsistent* with the testamentary motive. The Prentice-Hall Tax Service (1943, Vol. 3, par. 23, 221 D), contains the caption of "Transfers held not taxable where motive is to provide independent income for dependents. In the the following decisions the *controlling* factor in deciding the issue in each case was that the transfers in question were

made *primarily* for the purpose of providing independent incomes for dependents of the donor." Forty-three cases are cited there which hold that where the *compelling motive* for the transfers was to provide independent means for decedent's children the transfer was not taxable. Six of those cases were decided in 1943.

If respondent's broad position were correct, not only could these cases not have been decided favorably to the taxpayer, but almost no *inter vivos* gift of a substantial portion of the assets of a transferor of advanced age to his children or grandchildren would be exempt from estate tax where the transferor in making the gifts followed the intention expressed in his will of dividing the property *per stirpes,* an intention which transferors generally follow, for their gifts are usually made in equal portions to these who will also take under their wills. Any explanation which would be given by a transferor of advanced age would be rejected because such a decedent must always "have known that the sands of life were fast running out and that his life expectancy was short and that it was highly desirable his house be put in order". (Tr. p. 41.) There would be no substantial dissimilarity between the "time and manner in which the transfers were made" (Tr. p. 41) in this and in those cases.

The rationale of such a doctrine would be the repudiated one (*U. S. v. Wells,* 283 U.S. 102) of old age with its "premonitions and promptings independent of mortal disease". Though the Court below pro-

tests that such is not the case, it is difficult to read its decision analytically without concluding that the rationale of its decision is old age.

Estate of Charles Delany (1943), 1 T.C. (No. 105), is in point. There a decedent made transfers in 1917, 1923 and 1935 (two years and two months before his death) of "very substantial" amounts of his assets (about 50% or over $700,000). These gifts were as follows: (1917) a ten thousand dollar insurance policy to his son as trustee for the benefit of his two daughters for life, (1923) to another trustee life insurance policies aggregating $200,000 and bonds of the face amount of $195,000 for the benefit of his two daughters, (1935) to trustees, securities valued at $177,-495.24 for the benefit of these daughters, (1935) an absolute gift to his son, to equalize the gifts to the daughters, of securities valued at $86,126.38. The decedent died in 1937 from coronary thrombosis at the age of 80 years and 7 months. He left an estate of $763,754.22, exclusive of these gifts.

In hold that the gifts had not been made in contemplation of death, the Court said:

> "It is also shown that the decedent was moved to make gifts to the trust for the purpose of providing his daughters with independent incomes, and the gift to his sons was for the purpose of equalizing the gifts among the children. All of these were purposes associated with life rather than death, and in such circumstances, the value of the gifts is not includible in decedent's gross estate (citing cases).
>
> Decedent was approximately 80 years and 7 months of age at the date of his death, and was

past 78 when he made the last two gifts in 1935, but age alone is not the decisive test.

See Estate of Robert Wetherill, 36 B.T.A. 1259, in which case the decedent was 83 years of age at death. In Edward C. Moore, Jr., et al., Executors, 21 B.T.A. 279, the decedent died at the age of 86 and the gifts were made within two years of death. In Estate of Katherine H. Talbott, 42 B.T.A. 1081, the decedent died of coronary occlusion at the age of 71 years. In the two latter cases we held that the gifts were not made in contemplation of death. The facts in the Talbott case are strikingly similar to the case at bar. As the Supreme Court pointed out in United States v. Wells, supra:

> 'Old age may give premonitions and promptings independent of mortal disease. Yet age in itself cannot be regarded as furnishing a decisive test for sound health and purposes associated with life, rather than with death, may motivate the transfer.'

We find nothing in the present record to indicate that the contested transfers were gifts causa mortis or were intended as substitutes for testamentary dispositions. While the aggregate of the gifts was very substantial in amount, decedent retained a material portion of his property, which he disposed of by will."

See, also, *Estate of C. A. Proctor v. Hassett,* 1943, D. C. Mass. P. H. Fed. Tax Serv. 1943 par. 62,796; *Security First National Bank of L. A., Margaret B. Smith* (*Excrs., Est. of John B. Bryan*), Memo T. C. 4-30-43, Docket No. 106494; *Estate of Charles T. Smith,* Memo T. C. 1-30-43, Docket No. 108998; *Cen-*

tral National Bank of Cleveland v. U. S. (1941), 41 Fed. Supp. 239, 94 Ct. Cl. 527; *C. F. Kroger et al.,* Memo T. C. 8-17-43, Docket No. 201; *Wishard Exec. v. U. S.* (1943), Fed. Tax Service par. 62,703 (decedent was 89 years old when he died. Seven years before he surrendered all interest in favor of his sister and wife in an annuity contract. The transfer was held not taxable as it was for the purpose of providing independent incomes for sister and wife).

The gifts in the *Delaney* case were like Koch's, made to the natural objects of decedent's bounty. The terms of Delany's will which disposed of the material part of the estate retained does not appear from the findings. It is only logical to assume, however, that in making these transfers (Delany equalized the gifts to the daughters with one to the son), Delany, like Koch, followed the same intention expressed in his will of dividing his property *per stirpes.*

When he made these gifts, Koch was thinking of more than just seeing Ralph through Stanford. If that had been all there might be some point in the Court's observation that "Ralph had no immediate need for any large sum of money", that "several years would elapse before he (Ralph) could embark on a business career" and that Koch "as long as he lived was in a position to furnish Ralph with funds required either for his education or for business". Incidentally, Delany's children do not appear to have been in need either of the large sums given them and Delany could also have furnished them with funds

as long as he lived. But Koch had in mind the overall situation of family discord and antagonism between himself and Ralph's father and stepmother. He wanted the boy to have an income which would make him "absolutely independent" of all that. That is what he said and there is no reason to doubt it. Then he wanted to equalize this gift with one to George. This explanation which he (Koch) gave for "advancing the time of enjoyment by Ralph of such a substantial portion of his property" was the same as the Tax Court accepted in the *Delany* case for a similar advancement of the time of enjoyment by that decedent's children of an even more substantial portion of his property.

The *Delany* case presents further parallels. There the Tax Court believed that the decedent also wanted to relieve himself of the responsibility of handling a portion of his extensive holdings and to have his children assume responsibility of management during his lifetime. The fact that three of these gifts were in trust with trustees other than the children themselves (the son was trustee of only one) did not prevent the inference that he wanted the children to share more responsibility. In the instant case, if Koch did not want to "school" Ralph, he may well have wanted George to assume still more responsibility of management over his assets than he had in the past. If the "activities of a normal life had all but ceased" (Tr. p. 41), it is a fair inference that Koch also wanted to relieve himself of the responsibility of handling such a substantial portion of his assets.

Respondent insists that Koch was "tax conscious". This remark is based on the fact that at the suggestion of George he made the gifts in issue in two separate years (1938 and 1939) to minimize gift (not estate) taxes. (Note, a gift tax was paid on the trust for Ralph, though respondent states at page 37 of its brief that none should have been imposed.) But tax consciousness (unless it relates to estate tax) is a motive associated with life. It has been held frequently that transfers motivated by the desire to reduce *gift* or income taxes are not made in contemplation of death. In *Estate of Annie Felton Howell, Josephine F. Howell and C. Howell, Excrs.,* Memo T. C. 1-28-43, Docket No. 108401, the taxpayer to avoid *gift* taxes and to reduce income taxes transferred property in 1932 at the age of 80 years and died in 1937 at 85 years of age. Held, that the transfer was motivated by a desire to save taxes and was not a gift made in contemplation of death.

In *Estate of John B. Waterman,* Memo B.T.A., Docket Nos. 99743, 98450, 12-12-41, the decedent died on April 30, 1937 at 71 years of age. A gift made to his wife on March 8, 1937 (a little more than a month before) was motivated by the desire to minimize federal income taxes. Held, that the gifts were not made in contemplation of death. See (1943) P.H. Federal Tax Service Vol. 3, Par. 23,221(B), and numerous cases cited there to the same effect.

The respondent argues that decedent was suffering from an "incurable disability". There is nothing in the record to show that the injury to his hip was

incurable or that it was such a serious nature as to alarm the decedent about its possible fatal consequences. Koch did not die from this injury, nor did he ever believe that he would. So far as the alleged paralytic stroke of May, 1938 (if it was a stroke, it was a light one from the effects of which Koch completely recovered) is concerned, respondent ignores the fact that if Koch did have such a stroke, he never knew that he had it. The attending physician, Dr. Cottrell (like the physician in *Estate of John Moir,* 47 B.T.A. (No. 104) 1942, P.H. Tax Service, par. 64-977, who did not tell decedent he had suffered cerebral hemorrhage) did not inform Koch of this, nor did anyone else. Cottrell told him instead that he would be all right in a few days. Koch himself always thought he had just twisted his hip and fallen. The fact is of great importance, for it negatives any idea of a "particular concern, giving rise to a definite motive". His statement a few months later to his son-in-law, "Don't worry about me croaking. I'll live longer than you do", and his general attitude indicated clearly that he was not worried about either the fall or the injury.

There is necessarily no dispute with the right of the trier of the fact to find from all the evidence whether the dominant motive of the transfers was to make a substitute for a testamentary disposition. But there was no direct evidence here that Koch's motive was testamentary and the Court was bound by the uncontradicted, positive testimony as to decedent's motive, since it was not improbable or unreasonable and was supported by the background of

family discord and all the other circumstances. 32 C. J. 1089. Not only were the decedent's statements to his associates the "best evidence of the decedent's state of mind and the reasons activating him in making the transfers" (*Wells v. U. S.,* supra, at page 1041), but they were the only direct evidence in the record. More disbelief of testimony is not affirmative proof of facts of an opposite nature. The Court could not arbitrarily reject this proof of intent and draw contradictory inferences as it did. 32 C. J. 1089.

It is thus not a question of asking this Appellate Court to try the case *de novo* but to hold that there was no substantial evidence to support the findings and decision of the Tax Court and that in deciding this case it applied an erroneous interpretation of the statutory term "contemplation of death".

CONCLUSION.

For the reasons stated, the decision of the Tax Court should be reversed.

Dated, San Jose, California,
February 16, 1944.

Respectfully submitted,

GERALD S. CHARGIN,
Attorney for Petitioner.